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No. 10-1149

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERRENCE JOHNSON, JIM HARRIS, JOSHUA ROBERTS,

Petitioners,

—v.—

BILL HASLAM, Governor of the State of Tennessee; MARK GOINS, Coordinator of Elections; TRE HARGETT, Secretary of State of Tennessee; RICHARD HOLDEN, Administrator of Elections for Shelby County; KIM BUCKLEY, Administrator of Elections for Madison County; ALBERT U. TIECHE, Administrator of Elections for Davidson County, in their official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners submit this reply brief to further clarify the legal bases for their constitutional claims and to underscore respondents' failure to address any of the central arguments raised in the petition.

I. TENNESSEE HAS ERECTED AN ARBITRARY AND IRRATIONAL STANDARD FOR RESTORING VOTING RIGHTS IN CONTRAVENTION OF CORE EQUAL PROTECTION PRINCIPLES AS ANNOUNCED BY THIS COURT.

While spending considerable time arguing that petitioners' equal protection claim is not entitled to a heightened level of scrutiny under the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), respondents fail to offer any rational justification for restoring the right to vote only to those within the class of convicted felons who can financially afford to make such payments. Petitioners believe that the arguments in their petition fully and adequately address why, under any level of scrutiny, Tennessee's requirement that restitution and child support obligations be paid prior to the state restoring their voting rights violates the Equal Protection Clause.[1]

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[1] Contrary to respondents' contention, petitioners did allege in their amended complaint that denying them the right to vote based on their inability to pay restitution and outstanding child support is a form of wealth-based discrimination and has a negative and disproportionate impact on indigent people. Amend. Compl. ¶¶ 1, 36, 44, 45, and Prayer for Relief. Thus, petitioners have raised a cognizable injury for purposes of challenging the lack of an indigency exception within the law with respect to the restitution and child support provisions.

Respondents' contentions in their opposition brief, however, obscure the legal theory underlying petitioners' equal protection claim as it pertains specifically to the child support provision.

Respondents argue that the child support requirement advances the state's purported goal of "protect[ing] the ballot box from past law-breaking felons who continue to flout the law and violate valid court orders," and that "[b]y failing to pay child support obligations, felons are continuing the very same type of behavior that led to their disenfranchisement." (BIO 14-15). Yet, even under a rational basis standard, respondents still carry the burden of justifying why the child support provision does not equally apply to all those individuals within the state who owe outstanding child support, and respondents have not met their burden. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (striking down, under rational basis, state law which bestowed tax benefits only to those veterans who moved to the state prior to a specified date).

Respondents cite *Jones v. Helms*, 452 U.S. 412 (1981), in support of the proposition that states have an interest in ensuring parents support their children. (BIO 14).[2] However, this Court upheld the

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Sprint Communications Co., L.P. v. APCC Serv., Inc., 554 U.S. 269, 273 (2008).

[2] As alleged in their amended complaint, petitioners Johnson and Harris had custody of their children when the lawsuit was filed. Amend. Compl. ¶¶ 4-5. Thus, to the extent respondents seek to encourage parents to take care of their children, petitioners Johnson and Harris already were doing that without

Georgia law at issue in *Jones*, which imposed additional punishments for those parents who had abandoned their children and then left the state, primarily because it equally applied to all parents in Georgia. 452 U.S. at 423 ("[The Equal Protection Clause] 'announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle.'" (quoting *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979))).

Respondents do not contest the fact that, unlike petitioners, parents who have not been previously disenfranchised but who owe outstanding child support payments, are still able to vote. Given its unequal application, the child support provision has a dubious relationship to the State's felon disenfranchisement law, and the existence of this double standard casts considerable doubt on whether the respondents' asserted policy interests were indeed the driving force behind the provision's enactment. *See Bullock v. Carter*, 405 U.S. 134, 145 (1972) (invalidating Texas law that imposed high filing fees on political candidates regardless of their financial ability to pay such fees, ruling that "the criterion for differing treatment must bear some relevance to the object of the legislation"); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that the "facial underinclusiveness" of a statute barring publication of a rape victim's name, while permitting

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the additional burden of having their voting rights tied to their parental obligations.

its dissemination through other means, "raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which [the state] invokes in support of affirmance).

Even accepting its asserted interest, Tennessee's goal of ensuring that parents satisfy their child support obligations cannot be met when the voting rights of some, but not all, parents engaged in the same conduct are burdened. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *Jones*, 452 U.S. at 424 ("[T]he State's administration of its laws must be impartial and evenhanded."); *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

Nor can Tennessee justify that distinction by relying on the fact that petitioners have felony convictions because the state has already made the decision to restore voting rights to convicted felons. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. at 534 (striking down law that denied food stamps to households comprised of unrelated people under rational basis test, holding that a law which accords different treatment based on who engages in the conduct violates traditional equal protection principles); *U.S. v. Armstrong*, 517 U.S. 456, 467

(1996) ("Our holding [in *Hunter v. Underwood*, 471 U.S. 222 (1985), striking down Alabama's felon disenfranchisement law] was consistent with ordinary equal protection principles, including the similarly situated requirement."); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (striking down Texas sodomy law that prohibited homosexuals, but not heterosexuals, from engaging in certain sexual acts, holding that, "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."). In accordance with this Court's equal protection jurisprudence, the means by which Tennessee seeks to achieve its interests should equally apply to all those who fit the category of persons owing outstanding child support.

In addition to being arbitrary, Tennessee's refusal to restore the vote to convicted felons who are too indigent to meet their child support obligations is also irrational. There is no inducement under those circumstances; there is only a stick and not a carrot. Tennessee seemingly recognized as much when it provided an indigency exception for those denied restoration of their voting rights because of a failure to pay court costs. Yet, Tennessee offers no explanation, and none is apparent, why the failure to pay court costs that are directly related to one's conviction is not an impediment to regaining the right to vote if that failure is based on indigency, Tenn. Code Ann. § 40-29-202, but the failure to pay unrelated child support payments is an absolute bar regardless of indigency. This provides yet another

reason to strike down the child support provision as a violation of equal protection.

II. TENNESSEE'S CHILD SUPPORT AND RESTITUTION REQUIREMENTS PRESENT A REAL, CONCRETE BARRIER TO PETITIONERS GETTING THEIR VOTING RIGHTS RESTORED IN VIOLATION OF THE TWENTY-FOURTH AMENDMENT.

Respondents argue that the Twenty-Fourth Amendment does not apply in this case because petitioners do not have a fundamental right to vote. (BIO at 16-17). They attempt to narrow this Court's ruling in *Harman v. Forssenius*, 380 U.S. 528 (1965), by once again contending that petitioners' status as convicted felons renders the state's re-enfranchisement scheme completely immune from a constitutional challenge. *Id.* However, the broad principles announced in *Harman* cannot be so easily dismissed solely on the grounds that petitioners have felony convictions. When interpreting the Twenty-Fourth Amendment, this Court has focused on dismantling economic barriers to the ballot box regardless of how sophisticated or camouflaged those attempts might be. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 439-440 (2006) (recognizing poll taxes as a device historically used to deny minorities the right to vote); *Johnson v. DeGrandy*, 512 U.S. 997, 1018 (1994) (describing poll taxes as a "reprehensible practice" designed to deny equal access to the ballot box).

Respondents do not contest that, but for the restitution and child support requirements, petitioners would be eligible to vote under Tennessee law. Thus, the financial obligations imposed upon petitioners solely for purposes of voting create a real and substantial economic barrier to the ballot box for them. Congress specifically sought to prohibit states from erecting a class-based system when it comes to voting, which is exactly what Tennessee's restitution and child support requirements do. This Court's decisions in *Harman* and *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), reaffirmed that valuable principle, Tennessee's restitution and child support provisions run afoul of that goal and cannot stand.

Moreover, respondents summarily assert that the restitution and child support obligations are not "taxes" covered under the Twenty-Fourth Amendment. (BIO at 17). However, they never address any of the statutory provisions petitioners previously cited clearly showing that such payments often go directly to the state and, thus, support government programs in the exact same way that other state tax revenues are used. (Pet. 23-24). Overall, respondents have failed to distinguish the restitution and child support obligations from the category of "other taxes" the Twenty-Fourth Amendment prohibits, and they do not negate the fact that the very people the amendment seeks to protect – the poor – are disproportionately impacted by Tennessee's flawed re-enfranchisement scheme.

III. THE SIXTH CIRCUIT'S DECISION REGARDING PETITIONERS' EX POST FACTO CLAIM WARRANTS THIS COURT'S REVIEW.

Lastly, respondents contend that this Court should not review the lower court's ruling regarding petitioners' ex post facto claim because the issue involves a matter of state law and, regardless, the lower court applied the correct legal standard and reached the proper conclusion. (BIO at 18-20).[3] The Sixth Circuit's ruling cannot stand, however, because it rests on an interpretation of state law that directly conflicts with the authoritative interpretation of the Tennessee Supreme Court.

This Court has held that ex post facto clauses are "aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995) (internal quotations and citations omitted); *Carmell v. Texas*, 529 U.S. 513, 524-25 (2000) ("the words *ex post facto laws* were technical expressions, and meant every law . . . which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when committed.") (internal quotations and citations omitted). In applying that test, this Court has focused on two critical factors: (1) whether the law is retroactive, thus applying to acts committed before its passage; and (2) whether the law

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[3] Respondents also assert that the lower court had supplemental jurisdiction over petitioners' state law claim, a matter which is not at issue in this case. (BIO at 18).

disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Lynce v. Mathis*, 519 U.S. 433, 441 (1997).

Neither the Sixth Circuit nor respondents contested the fact that Tennessee's restitution and child support obligations are being retroactively applied to petitioners. They also did not contest the fact that petitioners would have been eligible for restoration of their voting rights prior to the law's passage but are ineligible under existing law due to their outstanding financial debts. Rather, the Sixth Circuit's ruling was premised entirely on its finding that the law is not penal in nature. Pet. App. 24a. The Tennessee Supreme Court ruled otherwise in *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008), and that ruling is binding on the federal courts. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). Specifically, in *May*, the Tennessee Supreme Court held that Tennessee "[l]aws disenfranchising convicted felons are penal in nature," *id.* at 245 S.W.3d at 349, and thus Tennessee could not retroactively apply the disenfranchisement laws to individuals who were eligible to vote at the time of their conviction. Extending the period of disenfranchisement for those who are unable to pay restitution or child support is no less penal than an extension of petitioners' actual sentence. Whether the Sixth Circuit could have reached a different conclusion if it were writing on a clean slate is beside the point. The Sixth Circuit effectively created a clean slate by erasing what the Tennessee Supreme Court had already written about its own state law. That it cannot do.

Because petitioners satisfied all of the elements for establishing a violation of the state's ex post facto clause, the Sixth Circuit had no choice but to rule that the law's retroactive application to petitioners violated the state constitution. Petitioners ask this Court to reverse that erroneous decision and to require that the Sixth Circuit respect the Tennessee Supreme Court's interpretation of state law and enforce it accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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